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5  
6 UNITED STATES DISTRICT COURT  
7 NORTHERN DISTRICT OF CALIFORNIA

8 LUNELL GAMBLE, and SHEILA  
9 KENNEDY, on behalf of themselves as  
10 well as a class of similarly situated  
individuals,

11 Plaintiffs

12 vs.

13 KAISER FOUNDATION HEALTH  
PLAN, INC; KAISER FOUNDATION  
14 HOSPITALS, INC.; and THE  
PERMANENTE MEDICAL GROUP;  
15 all doing business as KAISER  
PERMANENTE MEDICAL CARE  
16 PROGRAM

17 Defendants

Case No. 4:17-cv-06621-YGR

**STATEMENT OF COMPLIANCE  
WITH JULY 19, 2019, ORDER ON  
PLAINTIFF'S RULE 16 MOTION**

Date: August 29, 2019  
Time: 9:01 a.m.  
Courtroom 1

Hon. Yvonne Gonzalez Rogers

18 Pursuant to the Court's July 19, 2019, Order (ECF 134), plaintiffs Lunell Gamble  
19 and Sheila Kennedy file this statement regarding their plan to proceed with this action,  
20 along with a certification of counsel regarding compliance with the Court's Order.

21 Plaintiffs brought their Rule 16 Motion in order to address, up front, potential  
22 conflict of interests that might arise during settlement discussions in this case, particularly  
23 in the event defendant seeks to pit plaintiffs against their counsel over statutory fees during  
24 negotiations. The motion was based in part on excerpts of the terms from the retainer  
25 agreement, which itself is modeled on standard practices in the industry since the Supreme  
26 Court's ruling in *Evans v. Jeff D.*, 475 U.S. 717 (1986). As was stated at the conference,  
27 counsel requested the Court's review of the potential conflict issue early on, as ethically he  
28 would not want to continue in the case in conflict with his clients.

1 Plaintiffs' counsel promptly provided a copy of the Court's July 19, 2019, order to  
2 the plaintiffs, and since then counsel has spoken several times with each on the telephone  
3 and in person to discuss it. In addition, plaintiffs were advised to obtain advice from  
4 independent counsel regarding the Order and the retainer agreement, and both appreciated  
5 that the Court was addressing their interests in the matter.

6 In response to the Court's order, plaintiffs state that they wish to continue in the  
7 litigation if possible under a revised retainer agreement that will satisfy the Court's Order  
8 concerning the potential conflict during settlement negotiations. Plaintiffs' counsel has  
9 prepared a proposed revised retainer agreement for the plaintiffs, with redline markings  
10 showing the additions and changes to the original retainer agreement. Counsel attests to the  
11 terms of the proposed revised agreement, as described below:

#### 12 **PROPOSED CLARIFICATIONS AND MODIFICATIONS**

13 **1. No Assignment of the Right to Claim or Waive Statutory Fees.** In the original  
14 agreement, plaintiffs agreed any "attorneys' fees *that may be recovered* from defendants in  
15 this case shall belong to Attorneys, to whom [they] assign[ed] their rights" (emphasis  
16 supplied). Counsel intended, and plaintiffs understood, that the assignment went to fees  
17 recovered – *i.e.*, the right to collect those fees – but that the clients did not assign the right to  
18 claim or waive counsel's statutory fees during negotiations. In addition, as the Court ruled,  
19 the original agreement did not distinguish between federal and state statutes, which may be  
20 governed differently. To address the Court's concerns, the proposed revised retainer  
21 agreement includes the following changes:

22 **Prior agreement:** "all attorneys' fees recovered pursuant to any statutory or  
23 common law fee-shifting provisions, Federal and California, for work done in connection  
24 with this litigation are property of the attorneys, as provided by California law (*Flannery v*  
25 *Prentice*) and shall not be regarded as property of the client.

26 **Proposed agreement:** "The right to collect all attorneys' fees recovered pursuant to  
27 any statutory or common law fee-shifting provisions, Federal and California, for work done  
28 in connection with this litigation are property of the attorneys, as provided by California law  
(*Flannery v Prentice*) and shall not be regarded as property of the client."

1           **Prior agreement:**

2           The Court may order, or the parties to the litigation may agree, that the  
3           defendants will pay some or all of attorneys' fees, costs, or both. Any such  
4           order or agreement will not affect Client's obligations under this agreement  
5           except as stated in this Section regarding calculation of the amount of attorneys'  
6           fees owed under this agreement and as stated in Section 6. Client agrees that  
7           any attorneys' fees that may be recovered from defendants in this case shall  
8           belong to Attorneys, to whom Client assigns her rights. Client understands  
9           that, under California law, the assignment of these rights may raise a potential  
10          conflict of interest between Client and Attorneys in the context of settlement  
11          agreements. This includes Attorneys right to claim, negotiate and settle any  
12          claim to statutory fees simultaneously with the representation of Client in the  
13          prosecution of her claims. Client has been advised of this potential conflict, of  
14          her option of seeking additional legal counsel in connection with this conflict,  
15          and Client expressly agrees to this assignment.

16           **Proposed agreement:**

17          The Court may order, or the parties to the litigation may agree, that the  
18          defendants will pay some or all of attorneys' fees, costs, or both. Any such  
19          order or agreement will not affect Client's obligations under this agreement  
20          except as stated in this Section regarding calculation of the amount of attorneys'  
21          fees owed under this agreement and as stated in Section 6. Client agrees that  
22          any attorneys' fees that may be recovered from defendants in this case shall  
23          belong to Attorneys. Client assigns to Attorneys the right to collect any  
24          statutory fees awarded by the court or determined during settlement. Consistent  
25          with the law (which may vary between federal and state claims), client assigns  
26          to attorneys all other rights with respect to statutory fees, except that, consistent  
27          with California law and rules of ethics, Client retains the right to direct  
28          Attorneys to accept a written settlement offer without Attorneys' consent. As  
29          stated in Section 7 below, however, Client agrees that if she waives or  
30          compromises Attorneys' right to claim statutory fees against the defendant  
31          without the Attorneys' consent, she will have a dispute with Attorneys over  
32          fees that must be addressed and resolved after the settlement, between  
33          themselves, by a neutral third party, or the Court. Client understands that,  
34          under California law, the assignment of these rights may raise a potential  
35          conflict of interest between Client and Attorneys in the context of settlement  
36          agreements. This includes Attorneys right to claim, negotiate and settle any  
37          claim to statutory fees simultaneously with the representation of Client in the  
38          prosecution of her claims. Client has been advised of this potential conflict, of  
39          her option of seeking additional legal counsel in connection with this conflict,  
40          and Client expressly agrees to this assignment.

**2. Clients Do Not Expect or Desire Contingent to Fees Be Paid as a Percentage.**

In the original agreement, plaintiffs acknowledged that they were retaining counsel on a contingent basis, but they understood that to mean the nature of the representation, not the payment of a “contingency fee” as a percentage of their damages. Under the contract, if – as was expected – attorneys fees determined by hours, rates and consideration of contingent risk exceeded the percentage of the plaintiffs’ damages, then plaintiffs and attorney understood that prevailing party fees would be paid by defendants, negotiated or determined by the Court separate from the damage award. Under the structure of the original retainer agreement, once substantial amount of attorney effort was required, it is in the plaintiffs’ interest to have counsel’s fees determined separately, as those fees do not reduce the plaintiffs’ recovery.

In the proposed revised agreement, this is made express:

Client acknowledges that Attorneys’ time, market rates and expenditures on her behalf may have no relation to the amount of her damages, and that in this case may have already exceeded 1/3 the amount that Client anticipates she might recover for her individual damages by way of settlement or judgment.

Further, the prior agreement read:

Client has been given the choice of paying monthly for attorneys' fees on an hourly rate basis and for costs, as an alternative to a contingent fee. Client understands that if she chooses to pay fees on an hourly rate basis, rather than a contingent fee basis, she must pay all fees and costs even if the claims are lost. Clients knowingly and voluntarily agrees to pay fees on a contingent fee basis, or have statutory fees paid at a rate that is a multiple of Attorneys’ then-current noncontingency hourly rate (*Ketchum v. Moses*), because fees are not paid before any amount is recovered and Client will not owe any attorneys' fees if she does not prevail against defendants.

The proposed revised agreement adds:

In light of the acknowledgment regarding the amount of attorneys’ fees in this case, Client acknowledges fees will not be determined as a percentage of her recovery. Client prefers that Attorneys fees are determined separate from any settlement or judgment on her damages, such that she will not have to pay any fees out of her recovery.

1           **3. No Penalty for Exercising Right to Direct a Settlement With Waiver.** In the  
2 original agreement, counsel included a provision to protect the right to recover a reasonable  
3 attorney fees from defendant under the California Fair Employment and Housing Act if  
4 plaintiffs prevail in the litigation. *See Flannery v. Prentice*, 26 Cal. 4th 572, 582-583 (2001)  
5 (“Attorneys considering whether to undertake cases that vindicate fundamental public  
6 policies may require statutory assurance that, if they obtain a favorable result for their  
7 client, they will actually receive the reasonable attorney fees provided for by the Legislature  
8 and computed by the court”); *id.*, at 588 n.16 (“allowing lawyers to contract with their  
9 clients for an assignment of the right to fees should enhance the public’s access to  
10 competent counsel”) (quoting State Bar Standing Com. on Prof. Responsibility and  
11 Conduct, Formal Opn. No. 1994-136 (1994), at 3); *Lindelli v. Town of San Anselmo*, 139  
12 Cal. App. 4th 1499, 1514-1516 (2006) (California protects the “certainty that attorneys who  
13 undertake public interest cases will receive compensation”).

14           Although California law differs from federal law on this point, even in *Evans v. Jeff*  
15 *D.*, the Supreme Court addressed assignment by statute, not assignment by contract. As  
16 pointed out by Justice Brennan in his dissent:

17           it may be that civil rights attorneys can obtain agreements from their clients not  
18 to waive attorney’s fees. Such agreements simply replicate the private market  
19 for legal services (in which attorneys are not ordinarily required to contribute to  
20 their client’s recovery), and thus will enable civil rights practitioners to make it  
economically feasible -- as Congress hoped -- to expend time and effort  
litigating civil rights claims. [*Evans v. Jeff D.*, 475 U.S. at 766.]

21           Since *Evans v. Jeff D.*, such written assignments are the “usual course.” *Gordon v.*  
22 *City of New York*, 2015 U.S. Dist. LEXIS 44271, \*12-13 (E.D.N.Y. 2015). In *Gordon*, the  
23 district court recognized the federal rule (consistent with *Evans v. Jeff D.*) that prevailing  
24 *parties* – not counsel – are entitled to seek fees, but it still went on to hold: “this principle  
25 does not preclude plaintiff from granting her attorney the authority to negotiate both the  
26 amount of her damages and the counsel’s fees to which he would be entitled. Plaintiff is  
27 entitled to attorney’s fees solely for the purpose of compensating her attorney.”  
28

1 [I]n the usual course, the stipulation of settlement provides – as it did in this  
2 case – for the payment of the entire amount of the settlement to the attorney,  
3 and directs him to deliver payment to the plaintiff in the amount she agreed to  
4 accept. As the Supreme Court observed in [*Astrue v. Ratliff*, 560 U.S. 586  
5 (2010)] “attorneys are the beneficiaries, and, almost always, the ultimate  
6 recipients of the fees that the statute awards to ‘prevailing parties.’” This is  
7 particularly true where, as here, the attorney is entitled to payment under a  
8 retainer agreement. Consequently, this line of cases does not preclude a  
9 plaintiff from authorizing her attorney to enter into an agreement to settle her  
10 claims for a set amount of damages and attorney’s fees that he separately  
11 negotiates. [*Id.* (citation omitted).]

12 Plaintiffs’ counsel understands that this Court – in the July 19, 2019, Order – did not  
13 so much take issue with the existence of a contractual provision protecting the right to  
14 negotiate or compromise statutory fees, as it concluded that the requirement of a 2.0  
15 multiplier would be a “penalty” for the client’s exercise of her settlement authority.  
16 Plaintiffs’ counsel respectfully submits that he intended no penalty by this provision.  
17 Counsel included provisions in the agreement to reflect the value of statutory fees under  
18 California law. In *Ketchum v. Moses*, 24 Cal.4th 1122 (2001), the California Supreme Court  
19 expressly departed from federal law, and held that “reasonable attorneys’ fees” under  
20 California fee-shifting statutes should be determined in consideration of substantial  
21 contingent risk multipliers. In the event that the lodestar calculation is made on the basis of  
22 market non-contingent rates – *i.e.*, rates that are paid to attorneys for every hour worked,  
23 without much delay and without regard to the outcome of the litigation – the market  
24 demands, and courts employing California law award, an enhanced fee. Plaintiffs’ counsel  
25 represented the fee claimant in *Ketchum v. Moses*, and won a 2.0 contingent risk multiplier  
26 from the trial court. He then represented petitioner in the California Supreme Court, which  
27 preserved the right to such multipliers for those who litigate California claims. As a result,  
28 civil rights litigators have been discouraged from bringing actions based solely on federal  
rights, but plaintiffs such as Gamble and Kennedy here are able to find counsel willing to  
undertake the lengthy, risky litigation needed to vindicate their rights. In light of all of this,  
the original retainer agreements stated the calculation not as a penalty, but to set forth the  
formula for determining the reasonable value of the statutory fees.

1        Nevertheless, it is plaintiffs' counsel's intention to modify the agreement to meet the  
2 Court's concerns. To that end, he has proposed a revised agreement. Under the proposed  
3 terms, any dispute between plaintiffs and counsel over the value of statutory fees would be  
4 submitted in the first instance to the Court. Whereas the previous agreement read:

5        It is agreed that no settlement of these claims may be made without Client's  
6 prior agreement. If, in settlement of this litigation, Client waives the right to  
7 recover attorneys' fees, costs or expenses (including partial waivers or  
8 compromises) without the consent of Attorneys, Client agrees to pay  
9 Attorneys: for waiver of fees, Attorneys' lodestar amount (their then-current  
10 hourly rate, as stated in section 5, as of the date of recovery times the number  
11 of hours expended on the case) times a contingent-risk multiplier of 2.0; and  
12 for waiver of costs, all of the costs advanced by attorneys in this case, whether  
13 or not a positive recovery is made by Client. Client understands that this  
14 agreement may give rise to potential disputes and conflicts between Attorneys  
15 and Client at the time of settlement, and in particular, where the defendants  
16 offer a settlement conditioned on the waiver, partial waiver or compromise of  
17 fees or costs and Attorneys are unwilling to agree to the waiver, partial waiver  
18 or compromise. Client understands that this agreement to pay the difference  
19 between Attorneys' statutory fees and costs and the amount of fees and costs  
20 paid in settlement may limit, or even nullify Client's recovery, and dissuade her  
21 from agreeing to a settlement with the defendants. Client has been advised of  
22 the option of seeking additional legal counsel on the topic. Client expressly  
23 agrees to this provision because she knows that otherwise Attorneys would be  
24 unwilling to enter into this agreement.

17        In the proposed revised agreement, the section has been revised to read:

18        It is agreed that no settlement of these claims may be made without Client's  
19 prior agreement. If, in settlement of this litigation, Client waives the right to  
20 recover attorneys' fees, costs or expenses (including partial waivers or  
21 compromises) in dispute with Attorneys over amounts, Client agrees to pay  
22 Attorneys: for waiver of fees, out of her recovery the reasonable value of  
23 Attorneys' statutory fees, as determined according to the legal standards  
24 applicable for those statutory fees; and for waiver of costs, all of the costs  
25 advanced by attorneys in this case, whether or not a positive recovery is made  
26 by Client. Attorneys and Client agree that if a dispute over waiver or  
27 compromise of statutory attorneys' fees arises in this case, and if Client directs  
28 Attorneys to accept a settlement which waives or compromises fees, Attorneys  
will consummate the settlement on Client's behalf, and Attorneys and Client  
will thereafter jointly submit to the district court's supplemental jurisdiction for  
a determination of reasonable Attorneys' fees. If the Court declines to  
determine the matter, the dispute may be submitted to a neutral third-party with  
the parties' consent, or filed in the Superior Court.

1 Client understands that this agreement may give rise to potential disputes and  
2 conflicts between Attorneys and Client at the time of settlement, and in  
3 particular, where the defendants offer a settlement conditioned on the waiver,  
4 partial waiver or compromise of fees or costs and Attorneys are unwilling to  
5 agree to the waiver, partial waiver or compromise. Client understands that this  
6 agreement to pay the reasonable value of Attorneys' statutory fees may limit, or  
7 even nullify Client's recovery, and dissuade her from agreeing to a settlement  
8 with the defendants. For that reason, and others, Attorneys and Client both  
9 prefer to have Client damages and Attorneys' fees determined separately in any  
10 judgment or settlement, and both prefer to avoid "lump sum" settlement offers.  
11 Client has been advised of the option of seeking additional legal counsel on the  
12 topic. Client expressly agrees to this provision because she knows that  
13 otherwise Attorneys would be unwilling to enter into this agreement.

14 Plaintiffs' counsel is willing to modify the agreement with these terms, and proceed  
15 with plaintiffs' claims in the litigation, if such terms resolve the issues identified by the  
16 Court. Plaintiffs have reviewed the proposed revised agreement, both are interested in  
17 pursuing their claims under a modified agreement, and both wish to know whether the  
18 proposed agreement satisfies the Court's concerns. Plaintiff Gamble has consented to the  
19 proposed agreement. Plaintiff Kennedy is reviewing the terms further with independent  
20 counsel, and intends to complete that review before the August 29 compliance hearing.  
21 Plaintiffs' counsel will supplement this statement when that has been completed.

### 22 ADEQUACY OF PUTATIVE CLASS COUNSEL

23 Counsel is aware of the Court's admonitions regarding adequacy of counsel, and –  
24 pursuant to the Court's May 24, 2019, Order (ECF 112) – he has undertaken responsibility  
25 to remedy the issues identified by the Court. He has also intended to fulfill duties of  
26 putative class counsel, and ultimately to obtain additional legal resources to do so. He  
27 cannot change the fact that he is a sole practitioner with responsibilities in other cases, or  
28 that a plaintiffs' practice often requires work on multiple cases with little prediction as to  
the ebb and flow of work. Counsel has tried to schedule work, and ask for time adjustments,  
so that focused time can be spent to complete substantial briefing and argument that  
constitute the practice of law. In this case, he has sought stipulations, and he has filed  
contested extension requests before the due date. He has received extensions of time, and he  
has been denied extensions, but has complied with the Court's orders either way.



1 From the start, plaintiffs' counsel has contemplated that additional legal resources  
2 would be needed to prosecute the case through class certification, and that adequacy of class  
3 counsel would be an issue in that proceeding. Counsel anticipated that, initially, he would  
4 be able to meet substantial litigation responsibilities without additional legal resources,  
5 including superior court litigation, opposing motions to dismiss and strike, initial  
6 disclosures, Rule 16 motion, discovery plan and preparations for the discovery conference.  
7 At the same time, it was (and is) conceivable the parties might resolve the case by settling  
8 plaintiffs' individual claims in conference with Magistrate Judge Spero. As such, counsel  
9 thought plaintiffs would have until the time of the class certification motion to bring on  
10 additional lawyers, when counsel would seek certification as class counsel.

11 Since the Court's May 24 Order, however, counsel has undertaken efforts to  
12 associate additional counsel forthwith. Despite significant progress in that regard, the efforts  
13 have been complicated by the advent of the Court's order staying the action, and the  
14 prospect for settlement at a conference initially scheduled for August 29 (but now vacated).  
15 Plaintiffs' counsel has scheduled additional conferences to occur in the near future, and will  
16 continue his efforts to obtain additional legal resources until the litigation is complete.

17 Plaintiffs suggest that the Court leave in place the stay until the matter of the  
18 proposed revised retainer agreement is resolved. Thereafter, if those issues are resolved,  
19 plaintiffs suggest that the Court hold a status conference with the parties to determine  
20 whether the stay should remain while the parties reschedule their conference with  
21 Magistrate Judge Spero. Either way, plaintiffs request that the Court defer the question of  
22 adequacy of counsel as class counsel until the class certification motion.

23 In the event that the Court finds the case not suitable as a class action then, or at this  
24 juncture, putative class members would face the restart of their statutes of limitations, and  
25 would have to decide whether to seek to intervene here, or file separate lawsuits. In the  
26 event that the case is dismissed due to a settlement, putative class members still would have  
27 the option of filing their own lawsuits elsewhere.

28

1 **CONCLUSION**

2 Plaintiffs have reviewed the Court's July 19, 2019, Order, have been advised to seek  
3 advice from independent counsel, and are interested in pursuing the litigation under a  
4 revised retainer agreement, if it satisfies the concerns raised by the Court regarding conflict  
5 of interests. Plaintiffs' counsel intends to associate additional lawyers to work on this case,  
6 and requests that the issue of adequacy of counsel – as class counsel – be deferred until the  
7 time of class certification. Plaintiffs suggest that the Court maintain the stay until the matter  
8 of the retainer agreement is resolved, and that thereafter the Court hold a status conference  
9 with the parties to address case scheduling and lifting of the stay.

10 Respectfully submitted,

11 Dated: August 23, 2019

LAW OFFICE OF JEREMY L. FRIEDMAN

12 By: /s/Jeremy L. Friedman  
13 Jeremy L. Friedman  
14 Attorney for plaintiff Lunell Gamble

15 **DECLARATION OF COUNSEL**

16 I, Jeremy L. Friedman, declare and state:

17 1. I am attorney of record for named plaintiffs and the putative class in this case. I  
18 make this declaration in response to the Court's July 19, 2019, Order requiring certification  
19 of compliance after ruling on plaintiffs' Rule 16 motion. This declaration is based upon my  
20 own personal knowledge. If called as a witness, I would and could testify competently to  
21 the following matters.

22 2. On the day that I received notice of the Court's July 19 Order, I spoke to both  
23 plaintiffs about it, and within a day or so thereafter was able to send them a copy of the  
24 order. Both plaintiffs were advised to seek advice from independent counsel regarding the  
25 order and the retainer agreement.

26 3. It is not my desire or intention to go forward representing any client if my  
27 contract puts me in a conflict. It was my desire to avoid potential conflicts during settlement  
28 discussions that prompted me to bring the Rule 16 motion in the first instance. At the same  
time, I have no intention of abandoning the plaintiffs in this case. Instead, I want to continue

1 representing them – with their consent, obviously – under a retainer agreement that meets  
2 the Court’s concerns and protects my rights as permitted by law and rules of ethics.

3 4. Since the time of the order, I have had several communications with plaintiffs, in  
4 person, through texts and over the telephone. Both indicated to me that they too would like  
5 to continue pursuing the litigation under a revised retainer agreement, if such an agreement  
6 satisfies the concerns raised by the Court.

7 5. I have prepared a proposed revised retainer agreement for the plaintiffs to review,  
8 in a redline version so that they can see what edits and additions have been made. The terms  
9 of the initial agreement and revised proposed agreement recounted in this statement – with  
10 additions in highlight – are true and accurate of my own knowledge. I have reviewed the  
11 Order and the proposed agreement with both plaintiffs. Plaintiff Gamble has signed the  
12 agreement. Plaintiff Kennedy has reviewed it favorably, but intends to continue reviewing it  
13 with independent counsel as soon as possible, before August 29. I intend to file a  
14 supplement to this statement with that information before the compliance hearing, and I will  
15 be prepared to attend on that date if the compliance hearing is not vacated by the Court.

16 6. From the start of the case, I have discussed possible association of attorneys at  
17 times. I redoubled my efforts to obtain additional legal resources after the Court’s May 24,  
18 2019, Order. One set of discussions was close to completion, but was complicated after  
19 ruling on the Rule 16 motion, as well as by the prospect of individual plaintiff settlements in  
20 August. It is my intention to continue to search for additional legal resources; I have  
21 scheduled conferences with lawyers to occur in the coming days and weeks; and I believe  
22 that I would be able to associate additional attorneys prior to the bringing of a class  
23 certification motion in this case.

24 7. Since the start of the case, I have received several telephone calls from other  
25 African American employees or former employees of defendant seeking legal counsel over  
26 their terminations or failure to promote. It is my understanding that several individuals  
27 would be interested in intervening in this action if class certification is denied, or if the class  
28 allegations were dropped.

1 I declare under penalty of perjury that the foregoing is true and correct. Executed  
2 this 23<sup>rd</sup> day of August, 2019.

3 /s/Jeremy L. Friedman  
4 Jeremy L. Friedman

5 **CERTIFICATE OF SERVICE**

6 I hereby certify that the foregoing was filed with the Clerk of the Court for the  
7 Northern District of California, by using the CM/ECF system. I certify that all participants  
8 in the case are registered CM/ECF users and that service will be accomplished by the  
9 CM/ECF system.

10 /s/ Jeremy L. Friedman  
11 Jeremy L. Friedman